

BOARD OF ALIEN LABOR CERTIFICATION APPEALS
800 K St., N.W.
WASHINGTON, D.C. 20001-8002

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Date: August 19, 1998
Case No: 97-INA-520

In the Matter of:

TRIDENT MICROSYSTEMS, INC.
Employer

On Behalf of:

JIANBO ZHANG
Alien

Appearance: Jean N. Hsiang, Esq.
for the Employer and the Alien

Before: Holmes, Vittone and Wood
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of alien, Jianbo Zhang ("Alien") filed by Employer Trident Microsystems, Inc. ("Employer") pursuant to 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1182(a)(5)(A)(the "Act"), and the regulations promulgated thereunder, 20 CFR Part 756. The Certifying Officer ("CO") of the U.S. Department of Labor, San Francisco, California, denied the application, and the Employer and Alien requested review pursuant to 20 CFR 656.26.

Under 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified and available at the time of the application and at the place where the alien is to perform such labor; and, (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers

similarly employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written arguments of the parties.

STATEMENT OF THE CASE

On or about June 19, 1995, the Employer filed an amended application for labor certification to enable the Alien to fill the position of Hardware design Engineer in its Manufacturing & sale of PS/2 and PC/AT chips & systems business.

The duties of the job offered were described as follows:

"Responsible for logic design and verification of graphics and video chip using verilog HDL and emulation system, emulation boards and environment development for logic verification. Must know how to design graphics chip using verilog HDL, Synopsys synthesis tool, Candance schematic entry and emulation system. Knowledge of: computer graphics, desktop video, digital signal processing, board development and debugging tool (ORCAD, PADS etc.), PC architecture and x86 assembly language."

An M.S. or equivalent in EE/CS was required and 6 months experience in the job opportunity or related experience in graphics hardware design. Wages were \$50,800.00 per year. The applicant would supervise 0 employees and report to the Engineering Manager. (AF-120-181)

On July 31, 1996, the CO issued a NOF denying certification. The CO alleged that employer may have violated 20 C.F.R. 656.21(b)(2)(i)(A) in that the job requirements may be unduly restrictive. The CO stated for corrective action: "The employer must either: 1) delete the restrictive requirement and express a willing to retest the labor market; or 2) document that the requirement is a common one for the occupation in the United States; or 3) justify the restrictive requirement on the basis of 'business necessity'." The CO also required that the employer must readvertise under the correct heading of "ENGINEER, Electronics Design; in order to broaden the labor market and to afford the opportunity for qualified U.S. workers to respond to the ad." Thirdly, the CO found the text of the advertisement lacked clarity in the statement: "MS EE/CS + 6 mos. Exp. Or in graphics hardware design". Finally, the CO stated: "Elsewhere in

this Notice of Findings the employer is asked to amend or justify requirements and/or wages, and if an amendment is made, the employer is required to retest the labor market for the availability of U.S. workers. Since U.S. workers who may be qualified, able, willing and available applied as a result of the initial recruitment, job related reasons must be given for the rejection of these workers. That an additional recruitment effort is being made is not a job related reason for the rejection of the initial group of U.S. applicants." (AF-114-118)

Employer, September 3, 1996, forwarded its rebuttal, stating that the requirements are appropriate for the advanced level position of Engineer III. Employer in its 10 page rebuttal signed by the Vice President for Engineering, listed in detail the history of the application from its original initiation on August 4, 1994, and the numerous changes, amendments required of Employer and employer's responses to these numerous requests, in addition to rebuttals of alleged deficiencies in the application. With respect to the issue of unduly restrictive requirements, Employer stated:

"Finding No. 1 asserts that the requirement of a Masters of Science degree in Electrical Engineering or Computer Science is not customary for an entry level position.

"This issue is improperly raised. Never before at any stage in this application has an objection been made as to the requirement of a master's degree. In any event, the position being advertised is not an entry-level position. As the EDD itself recognized, the position offered is at the level of Engineer III. Based upon that determination, the EDD required the company to raise its wage offer. It did so, increasing it from \$48,000 to \$50,800. It would certainly be unfair and arbitrary for the DOL, at this point, to contend that the position is merely an entry-level job. Indeed, the position is an advanced-level position, and the educational requirements are appropriate for that level.

"It is also business necessity to require at least a master's degree for this position. The duties of the position include the performance of logic design and verification of graphics and video chips. It requires knowledge of advanced level computer graphics and desktop video. Knowledge of computer graphics include: graphics algorithms for drawing 2D primitives such as Scan Converting Lines, Filling Polygons, Pattern Filling and Line Style; 2D/3D geometrical transformation; Hidden-surface Elimination such as Z-Buffer Algorithm etc. Knowledge of Desktop video include: video analog-to-digital conversion, color decoding and encoding and color space conversion and video signal filtering etc.

"These knowledge are highly technical subjects and can only be obtained through graduate-level coursework or related research project experiences obtained as part of a master's degree program. Undergraduate programs do not offer advanced theoretical

training in logic design, computer graphics and digital signal processing as required by this position. In addition, I, on behalf of the employer, also certify that every employee in this design group has at least a master's degree which is the minimum requirement for the position of Hardware Design Engineer." (AF-48-57)(Rebuttal was incorrectly listed in the file sent to this office as 87-113)

On November 6, 1996, the CO issued a Final Determination denying certification on the sole basis that: "The employer failed to submit convincing documentation to justify the need for a Master's Degree in EE/CS. (AF-84-86)

On December 4, 1996, Employer filed a request for review and reconsideration of Final Determination. (AF-1-83)

DISCUSSION

Section 656.25(e) provides that the Employer's rebuttal evidence must rebut all the findings of the NOF, and that all findings not rebutted shall be deemed admitted. Our Lady of Guadalupe School, 88-INA-313 (1989); Belha Corp., 88-INA-24 (1989)(en banc). Failure to address a deficiency noted in the NOF supports a denial of labor certification. Reliable Mortgage Consultants, 92-INA-321 (Aug. 4, 1993). On the other hand, where the Final Determination does not respond to Employer's arguments or evidence on rebuttal, the matters are deemed to be successfully rebutted and are not in issue before the Board. Barbara Harris, 88-INA-32. (April 5, 1989)

We believe the CO was incorrect in denying certification on the basis that employer had not rebutted the CO's finding that the job experience requirements were unduly restrictive. According to 656.21(b)(2), where an employer specifies requirements that are not normal for the job in the United States, or that are not defined in the Dictionary of Occupational Titles, the employer must demonstrate business necessity for the requirements. See, Ivy H. Cheng, 93-INA-106 (June 28, 1994); Law Offices of Niti Crupiti, 96-INA-139 (August 26, 1997). Thus it must be determined whether the employer demonstrated the business necessity of the Master's degree in Engineering or Computer Science. Employer must meet the standard established in Information Industries, 88-INA-82 (Feb. 9, 1989)(en banc) that the job requirements bear a reasonable relationship to the occupation in the context of the employer's business, and are essential to perform, in a reasonable manner, the job duties as described by the employer.

Employer has described in considerable detail the requirements in his business which are a combination of engineering and computer functions. The Vice President has sworn that all employees in the branch where the job will take place have obtained Master's Degrees. The CO has not found Employer's description of job duties are unnecessary. Indeed, Employer has

attempted to comply with various different requests to clarify the job description to conform to the Employment Services wishes, whether the opportunity be described as an engineering function or a computer related function. Additionally, Employer has provided sound reasoning for its requirements, which are not for an entry level position but rather an Engineering III equivalency.

It is well established that where an employer has complied with the stated regulatory criteria governing the advertisement and recruitment of employees, the CO should not require additional advertisements and recruitment without offering a reasonable explanation of why the employer's advertisements or recruitment were inadequate to test the job applicant market and why the recruitment efforts recommended by the CO would significantly add to the test. Alpine Electronics of America, Inc. 88-INA-107 (March 14, 1989)(en banc); Del Tropico Foods, Inc. 88-INA-120 (May 2, 1990). This the CO has failed to do.

Since we find that Employer has carried its burden of demonstrating that the job opportunity is not unduly restrictive and that alien is entitled to labor certification, the further allegations as to procedural errors need not be addressed. We agree with employer that administrative agencies should be governed by considerations of fairness and not act in an arbitrary and capricious manner.

ORDER

The Certifying Officer's denial of labor certification is REVERSED and the matter remanded for granting of certification.

For the Panel:

JOHN C. HOLMES
Administrative Law Judge